

EXEMPTIONS FROM CIVIL RESPONSIBILITIES

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The "church" has always claimed a certain superiority over, or at least freedom from, state control. This may or may not be based on a natural law jurisprudence.¹ It may, in the United States, merely be a reflection of the fundamental norm of a state or federal constitution.² At the same time the church is a corporate body within society, sharing its cultural advantages, its system of property, its legal structure.³ And its members—even its clergy—are citizens and must live as citizens as well as churchmen. This dualism has not been easy for either the church or the state. If the church and churchmen purchase independence from the state at the cost of inability to criticize or challenge the state, from whence will come the morality which keeps government ethical and responsive to man's fulfillment? How will the state avoid becoming totalitarian, an uncontrolled end in itself? But if whatever is done in the name of religion is exempt from state surveillance is this not the breeding ground of anarchy? Nor do we find much solace in suggesting that only "true" religious observances be exempt from state control. For this leads down the road of heresy trials—a path liberally sprinkled with the blood of martyrs.⁴ Recognizing all these difficulties,

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¹ This has been well examined recently, both from the Catholic and non-Catholic view, and many of the earlier authorities referred to in R.J. Henle, S.J., *American Principles and Religious Schools*, 3 ST. LOUIS L. J. 237 (1955); Konvitz, *Separation of Church and State: The First Freedom*, 14 LAW & CONTEMP. PROB. 44 (1949); KONVITZ, *FUNDAMENTAL LIBERTIES OF A FREE PEOPLE* (1957); as well as in veiled form in the briefs in *Everson v. Board of Educ.*, 330 U.S. 1 (1947) and *McCullum v. Board of Educ.*, 333 U.S. 203 (1948), and the many law reviews noting these cases. See JACQUES MARITAIN, *MAN AND THE STATE* (1951); SHEPPARD, *RELIGION AND THE CONCEPT OF DEMOCRACY: A THOMIST STUDY IN SOCIAL PHILOSOPHY* (1949); PARSONS, *THE FIRST FREEDOM: CONSIDERATIONS ON CHURCH AND STATE IN THE UNITED STATES* (1948); THOMAS AQUINAS, *THE SUMMA THEOLOGICA* XCVI; Corwin, *The 'Higher Law' Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928).

² Kelsen, *GENERAL THEORY OF LAW AND STATE* 263-69 (Wedberg transl. 1945); See *Everson v. Board of Educ.*, 330 U.S. 1, 34 (1947); James Madison, *Memorial and Remonstrance*, 2 WRITINGS OF JAMES MADISON 183-91 (1901); BLAU, *CORNERSTONE OF RELIGIOUS FREEDOM IN AMERICA* (1949); Konvitz, *supra* note 1; PFEFFER, *CHURCH, STATE AND FREEDOM* (1953); STOKES, *CHURCH AND STATE IN THE UNITED STATES* (1950); BUTTS, *AMERICAN TRADITION IN RELIGION AND EDUCATION* (1950); JOHNSON AND YOST, *SEPARATION OF CHURCH AND STATE IN THE UNITED STATES* (1948).

³ See Parts II—V of this symposium.

⁴ The Supreme Court has carefully avoided this area by reiterating that the Constitution knows no orthodoxy or heresy. *Dennis v. United States*, 341 U.S. 494 (1951); *United States v. Ballard*, 322 U.S. 78, 86 (1944); *Board of Educ. v. Barnette*, 319 U.S. 624 (1943); *Watson v. Jones*, 13 Wall. (80 U.S.) 679 (1871);

however, we must come face-to-face with the problem in its most difficult aspects and attempt to work out an overall philosophy answerable to this day's needs. This is what the present section will attempt, for it is believed that in formulating the civil responsibilities of the church, its clergy and members, we must face the crux of the whole state-church relational theory.

A.

CHURCH USE OF STATE PROPERTY

It is generally recognized that the first amendment to the Constitution combines two limitations:

- (1) Congress shall make no law respecting an establishment of religion,
- (2) or prohibiting the free exercise thereof.

In a rough sense the present topic (Church use of state property) is keyed to the first of these limitations and the later division (Exemption of members and clergy) is treated as an application of the second. That is, the key cases involving use of state or municipal property have been argued and decided on the basis of the "establishment" clause and its recent gloss—"the wall of separation," and "neither antagonism nor preference."⁵ Whereas the military service, conscientious objector, exemption and privilege cases have argued the "free exercise" clause which has developed its own gloss—"freedom to believe" compared to "freedom to act."⁶

The theory against the use of state property by the church can be stated much more broadly than any specific constitutional language: the state may raise public funds only for state purposes; there is no state church; to allow state property to be used for church purposes would be to use state funds for a non-state purpose. But certain state property is open to and used by everyone; may a church use that? We may

Note, 67 HARV. L. REV. 91 (1953). Yet strangely enough it has been the Supreme Court itself which has created a kind of orthodoxy and encouraged its incorporation into statutes by declaring that "we are a Christian people . . . whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952); *United States v. MacIntosh*, 283 U.S. 605, 625 (1931); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 470 (1892); *Selective Service Act of 1948*, 62 Stat. 612 (1948), 50, App. U.S.C. § 456(j) (1951).

⁵ Certainly this is the basis of the three key cases: *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *McCullum v. Board of Educ.*, 333 U.S. 203 (1948); *Zorach v. Clauson*, 343 U.S. 313 (1952). The "equal protection" argument is particularly strong in the Bible reading and similar cases. Every rule needs its exception, and it will be found that the public street and public park cases are more concerned with free speech (free exercise of religion) than with church-state separation.

⁶ The Supreme Court has on various occasions indicated that there is absolute freedom to believe but only limited freedom to act. This is one of our major problems to which later attention must be given. *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Reynolds v. United States*, 98 U.S. 145 (1878).

expect that the cases involving use of state property have, therefore, posed the following types of problems:

- (1) Use of state funds to aid in some way religious activity—exemplified by the school bus and free textbook cases.
- (2) Use of actual public educational facilities for religious purposes—exemplified in the released time, religious instruction and Bible reading cases.
- (3) Use of public park and street facilities — where the Jehovah's Witness cases shade over into free speech claims.

1. *Use of State Funds—Bus, Textbook and Similar Cases.*

Tons of copy have been written on the 5-4 decision in *Everson v. Board of Education*,⁷ and its holding that New Jersey could constitutionally provide reimbursement out of public funds for children transported to sectarian schools. What is less well known or publicized is what the Court did not decide and what the pattern before and since has been with regard to providing free transportation. "We do not mean to intimate that a state could not provide transportation only to children attending public schools," said the Court. The argument of the proponents of transportation to sectarian schools has strongly relied on "equality" under the fourteenth amendment and played down the feature of use of state property; it has been caught up in the Court's language, "That amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."⁸ Actually, the decision leaves the matter to the states.

States may determine that for the safety of their children they will furnish bus transportation—much as they provide traffic policemen near churches as well as near prize fights. This will be upheld (both prior and subsequent to *Everson*),⁹ particularly if there is a specific constitutional amendment.¹⁰ On the other hand, if the state intends the aid as primarily to sectarian schools rather than to the children, then the appropriation of funds is invalid.¹¹ There have been a considerable

⁷ 330 U.S. 1 (1947). There are over 200 articles, notes and comments on this case.

⁸ *Id.* at 18; See Blum, *Religious Liberty and Bus Transportation*, 30 NOTRE DAME LAW. 384 (1955), where the "equal protection" argument for providing transportation is presented.

⁹ *Bowker v. Baker*, 73 Cal. App. 2d 653, 167 P.2d 256 (1946); *Nichols v. Henry*, 301 Ky. 434, 191 S.W.2d 930 (1945); *Adams v. St. Mary's County*, 180 Md. 550, 26 A.2d 377 (1942); *Board of Educ. v. Wheat*, 174 Md. 314, 199 Atl. 628 (1938); *Zellers v. Huff*, 55 N.M. 501, 236 P.2d 949 (1951).

¹⁰ N.Y. CONST. art. 11, § 4; *Application of Board of Educ.*, 199 N.Y.Misc. 631, 106 N.Y.S.2d 615 (1951).

¹¹ *State ex rel. Traub v. Brown*, 36 Del. 181, 172 Atl. 835 (1934); *Sherrard v. Board of Educ.*, 294 Ky. 469, 171 S.W.2d 963 (1942); *Judd v. Board of Educ.*, 278 N.Y. 200, 15 N.E.2d 576 (1938); *Gurney v. Ferguson*, 190 Okla. 254, 122 P.2d

number of cases since *Everson* which agree with the minority in that case that of necessity the aid is to the sectarian school.¹²

It is generally accepted that a state may furnish free textbooks to students regardless of where they study—in public or sectarian schools. But again, there is no *requirement* that the state do so.¹³

It has been demonstrated that the federal government, while giving some aid to education, has never really developed aid potentials precisely because of fear of the church-state, segregated-integrated and state-federal constitutional conflicts.¹⁴

Behind these better known examples lies a considerable body of law on other attempts to use public funds in relation to churches and education. Attempts to integrate parochial schools into the public school system, to be supported by taxes, have uniformly failed.¹⁵ In emergencies, religious property has been rented and used for schools.¹⁶ Public funds have been given to sectarian hospitals and like institutions so long as they serve on a completely non-discriminatory basis,¹⁷ but payment of tuition to parochial schools has been disapproved.¹⁸

Some believe that they see a pattern in the cases: that the strongly Catholic states and judges uphold aid to parochial education. Although

1002 (1941), *appeal dismissed*, 317 U.S. 588 (1942); *Mitchell v. Consolidated School Dist.*, 17 Wash. 2d 61, 135 P.2d 79 (1943); *State v. Milquet*, 180 Wis. 109, 192 N.W. 392 (1928).

¹² *Consolidated School Dist. v. Parker*, 238 Iowa 984, 29 N.W.2d 214 (1947); *McVey v. Hawkins*, 364 Mo. 44, 258 S.W.2d 927 (1953); *Connell v. Board of School Directors*, 356 Pa. 585, 52 A.2d 645 (1947), *appeal dismissed*, 332 U.S. 748 (1947); *Visser v. Nooksack Valley School Dist.*, 33 Wash.2d 699, 207 P.2d 198 (1949).

¹³ *Cochran v. Board of Educ.*, 281 U.S. 370 (1930); *Chance v. Mississippi State Textbook Bd.*, 190 Miss. 453, 200 So. 706 (1941).

¹⁴ See *Veterans Benefits*, 38 U.S.C. §§ 901-66 (1958); *Mitchell, Religion and Federal Aid to Education*, 14 LAW AND CONTEMP. PROB. 113 (1949).

¹⁵ *Knowlton v. Baumhover*, 182 Iowa. 691, 166 N.W. 202 (1918); *Wright v. School Dist.*, 151 Kan. 485, 99 P.2d 737 (1940); *Williams v. Stanton School Dist.*, 173 Ky. 708, 191 S.W. 507 (1917); *Richter v. Cordes*, 100 Mich. 278, 58 N.W. 1110 (1894); *Harfst v. Hoegen*, 349 Mo. 808, 163 S.W.2d 609 (1942); *State v. Taylor*, 122 Neb. 454, 240 N.W. 573 (1932); *Zellers v. Huff*, 55 N.M. 501, 236 P.2d 949 (1951).

¹⁶ *Millard v. Board of Educ.*, 121 Ill. 297, 10 N.E. 669 (1887); *State ex rel. Jonson v. Boyd*, 217 Ind. 348, 28 N.E.2d 256 (1940); *Scripture v. Burns*, 59 Iowa 70, 12 N.W. 760 (1882); *Crain v. Walker*, 222 Ky. 828, 2 S.W.2d 654 (1928).

¹⁷ In many instances a constitutional provision helps out. *Bradfield v. Roberts*, 175 U.S. 291 (1899); *Kentucky Building Comm'n v. Effrom*, 310 Ky. 355, 220 S.W.2d 836 (1949); *Craig v. Mercy Hospital-Street Memorial*, 209 Miss. 427, 47 So. 2d 867 (1950); *Opinion of the Justices*, 99 N.H. 519, 113 A.2d 114 (1955); *Sargent v. Board of Educ.*, 177 N.Y. 317, 69 N.E. 722 (1904). *Contra*, *Bennett v. City of LaGrange*, 153 Ga. 428, 112 S.E. 482 (1922); *Cook County v. Chicago Industrial School*, 125 Ill. 540, 18 N.E. 183 (1888).

¹⁸ *Williams v. Stanton School District*, 173 Ky. 708, 191 S.W. 507 (1917); *Otken v. Lamkin*, 56 Miss. 758 (1879); *Synod of Dakota v. State*, 2 S.D. 366, 50 N.W. 632 (1891).

the cases tend in this direction, I do not see therein the *ratio decidendi*. I believe the courts have been trying to apply a difficult but valid test: If the aid is directly to the "church" the use of public funds (property) is uniformly held invalid; whereas, when the aid is a normal governmental service to its citizens regardless of their religious affiliations the grants will be upheld. It was precisely on the issue of which side of the line the facts placed the *Everson* case that the majority-minority divided. It seems to me that this is further borne out by the following paragraphs.

2. Use of Public Educational Facilities for Religious Purposes—Religious Instruction.

In this topic, as in the previous, the three key cases are well known: the unanimous *McCullum*¹⁹ case, holding religious instruction on the school premises invalid, the *Zorach*²⁰ decision (6-3), approving released time during which students received religious instruction away from public property, the *Doremus*²¹ case (6-3), dismissing an appeal from a state decision permitting "non-sectarian" (Old Testament) Bible reading in schools. Important as these cases are and clear as they are in recognizing that the actual use of public property for religious instruction is invalid, they nevertheless fall far short of telling the complete story.

First, it is interesting to see how the forces shift. The Catholic who argues that furnishing free bus transportation is non-sectarian, now argues (because the King James rather than the Douai edition is usually used) that Bible reading is aid to sectarianism.²²

Second, the Catholic has been little concerned in the released time programs, but some of the free-thinker groups have been much exercised.

Third, the religious instruction (*McCullum*) compared to the released time (*Zorach*) decisions show how forceful is the Court's objection to religious use of school property. This may be expanded by a long list of cases holding use of school property for religious purposes invalid.²³ The cases which are sometimes cited for the contrary turn

¹⁹ *McCullum v. Board of Educ.*, 333 U.S. 203 (1948).

²⁰ *Zorach v. Clauson*, 343 U.S. 306 (1952).

²¹ *Doremus v. Board of Educ.*, 5 N.J. 435, 75 A.2d 880 (1950), *appeal dismissed*, 342 U.S. 429 (1952).

²² See *Tudor v. Board of Educ.*, 14 N.J. 31, 100 A.2d 857 (1953), *cert. denied*, 348 U.S. 816 (1954).

²³ For early cases see *Scofield v. Eighth School Dist.*, 27 Conn. 499 (1858); *Spencer v. School Dist.*, 15 Kan. 259 (1875); *George v. Second School Dist.*, 47 Mass. 497 (1843); *Hysong v. Gallitzin School Dist.*, 164 Pa. 629, 30 Atl. 482 (1894). An unusual application of the problem is that of teaching in religious garb. *New Haven v. Torrington*, 132 Conn. 194, 43 A.2d 455 (1945); *State v. Boyd*, 217 Ind. 343, 28 N.E.2d 256 (1940); *Rawlings v. Butler*, 290 S.W.2d 801 (Ky. 1956); *O'Connor v. Hendrick*, 184 N.Y. 421, 77 N.E. 612 (1906); *Gerhardt v. Heid*, 66 N.D. 444, 267 N.W. 127 (1936); *Commonwealth v. Herr*, 229 Pa. 132, 78 Atl. 68 (1910).

out to be holdings that the plaintiff-taxpayer had no standing to sue.²⁴

Fourth, the Bible reading controversy has come down essentially to one of sectarianism—not one as to whether any religious instruction in public schools is proper. The position taken seems to be that the school need not be atheistic; God is a part of our culture and schools study all our culture; the Bible is a piece of literature and as such may be used; even Congress opens with prayer. The fact is that the Protestants in many communities have stolen a march on the Catholics (who were building adequate breastworks in their own parochial schools) by introducing the King James version.²⁵ The cases generally uphold Bible reading, even though the King James version is used, if it is primarily the Old Testament, without comment and without associated sectarian prayers or hymns;²⁶ whereas comment or like action will violate the law.²⁷ Only a few cases consider the Christian Bible improper reading for Jews or the King James version for Catholics.²⁸ Some see in *Tudor v. Board of Education of Rutherford*,²⁹ decided and certiorari denied soon after the *Doremus* case, the first indication that the Catholics may break the King James monopoly.

It would seem to the writer that the time may have come, in our broader knowledge of religions, to expose the student to a truly non-sectarian, even non-Christian educational experience of being introduced to all the great religions of the world—as an intellectual pursuit, not as dogma.³⁰

²⁴ *Davis v. Boget*, 50 Iowa 11 (1878); *State ex rel. Gilbert v. Dilley*, 95 Neb. 527, 145 N.W. 999 (1914); *Bull v. Stickman*, 298 N.Y. 516, 80 N.E.2d 661 (1948).

²⁵ BILLINGTON, *THE PROTESTANT CRUSADE, 1800-1860* (1938); BEALE, *A HISTORY OF FREEDOM OF TEACHING IN AMERICAN SCHOOLS* (1941).

²⁶ *People v. Stanley*, 81 Colo. 276, 255 Pac. 610 (1927); *Wilkerson v. City of Rome*, 152 Ga. 762, 110 S.E. 895 (1922); *Moore v. Monroe*, 64 Iowa 367, 20 N.W. 475 (1884); *Billard v. Board of Educ.*, 69 Kan. 53, 76 Pac. 422 (1904); *Hackett v. Brooksville School Dist.*, 120 Ky. 608, 87 S.W. 792 (1905); *Donahoe v. Richards*, 38 Me. 376 (1854); *Spiller v. Woburn*, 94 Mass. 127 (1866); *Kaplan v. Independent School Dist.*, 171 Minn. 142, 214 N.W. 18 (1927); *Lewis v. Board of Educ.*, 157 Misc. 520, 285 N.Y.Supp. 164 (Sup.Ct. 1935); *Board of Educ. v. Minor*, 23 Ohio St. 211 (1872); *Carden v. Bland*, 199 Tenn. 665, 288 S.W.2d 718 (1956).

²⁷ *State ex rel. Clithero v. Showalter*, 159 Wash. 519, 293 Pac. 1000 (1930), *appeal dismissed*, 284 U.S. 573 (1931); *People ex rel. Ring v. Board of Educ.*, 245 Ill. 334, 92 N.E. 251 (1910); *State ex rel. Freeman v. Scheve*, 65 Neb. 853, 91 N.W. 846 (1902).

²⁸ *Herold v. Parish Bd.*, 136 La. 1034, 68 So. 116 (1915); *State ex rel. Weiss v. District Bd.*, 76 Wis. 177, 44 N.W. 967 (1890).

²⁹ 14 N.J. 31, 100 A.2d 857 (1953), *cert. denied*, 348 U.S. 816 (1954), holding that Gideons International did not have a right to distribute their Bibles in schools since they were sectarian.

³⁰ An example of a text which does this is BURTT, *MAN SEEKS THE DIVINE* (1958).

3. *Religious Use of Parks and Streets.*

Although there are cases which attempt to distinguish between parks and streets,³¹ I believe there is no difference in principle. It was early held by the Supreme Court that a state or municipality might restrict the use of its parks.³² This case has never been expressly over-ruled. Yet, the net effect of a whole series of cases is that, if parks or streets are used by others for similar purposes, no religious group can be barred from like use. Thus no prior restraint may be put on the use of a public park or street.³³ Nor can conditions to the use of public places be attached that are in effect a denial of their use.³⁴ Permits to use public parks or places must be granted without discrimination, *e.g.*, against Jehovah's Witnesses.³⁵ The normal methods of use are allowed (including loud speakers), subject to regulation to prevent undue disturbance.³⁶

It will be seen from the above citations that these religious use cases are often the cases on which our civil rights rules of free discussion are based. As we remarked earlier, the religious use of public places cases are merely applications of the broad rule of free speech, belief, assembly and press which have been carried as a unit under fourteenth amendment protection.³⁷ It is submitted that it is appropriate to deal with this subject as one of discrimination and non-discrimination. The government has already "given" the use of a public place to the public. It is not, therefore, "giving" it to the religious organization, for the giving has already occurred. The real issue is whether the citizen is less entitled to the public place because he is acting religiously therein. This question answers itself unless the State is to be openly *anti* religious. The author presently has a case in the New York courts which may constitute a milestone decision as to the use of parks, coupled with the right of conscientious objection. (*Ahern v. Muste.*) There, a group of pacifists, wishing to protest the hysteria of civil defense propaganda, met in a New York City park as an act of worship. They were arrested, though many others who refused to take shelter were not.

³¹ *People v. Nahman*, 188 Misc. 1019, 70 N.Y.S.2d 29 (Ct. Spec. Sess. 1947).

³² *Davis v. Massachusetts*, 167 U.S. 43 (1897).

³³ *Martin v. Struthers*, 319 U.S. 141 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Snyder v. Milwaukee*, 308 U.S. 147 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

³⁴ *Saia v. New York*, 334 U.S. 558 (1948); *Hague v. C.I.O.*, 307 U.S. 496 (1939).

³⁵ *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951); Note, 51 MICH. L. REV. 1234 (1953).

³⁶ Note 34 *supra* and *Feiner v. New York*, 340 U.S. 315 (1951); *Kovacs v. Cooper*, 336 U.S. 77 (1949). See Annot., 10 A.L.R.2d 627 (1950).

³⁷ *Dennis v. United States*, 341 U.S. 494 (1951); *American Communications Assn. v. Douds*, 339 U.S. 382 (1950); *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Board of Educ. v. Barnette*, 319 U.S. 624 (1943); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Whitney v. California*, 274 U.S. 357 (1927); *Abrams v. United States*, 250 U.S. 616 (1919).

B.

CHURCH MEMBERS AND CLERGY

1. *Treatment of Conscientious Objectors.*

It is perhaps desirable to give a very brief historical review of our country's treatment of conscientious objectors. Nearly all of the colonial militia laws exempted conscientious objectors, as did the Continental Congress and the draft laws of 1812 and 1863.³⁸ Some exemptions were absolute, some required equivalent non-combatant service, and some provided for furnishing substitutes.³⁹ In 1917 at first no express exemption was granted but a procedure grew up and was legalized for exempting religious objectors and assigning them to ambulance and similar work. With the inception of World War II objectors were, after satisfying local draft boards of their religious sincerity, given a classification of IV-E and placed in work camps run by Selective Service and the so-called Peace Churches, where they performed non-military work of national importance. It is unnecessary to review here the great contribution these men made serving as attendants in mental hospitals or correctional institutions, as guinea pigs in medical experiments, as forest fire fighters and in similar jobs. This story has been well documented.⁴⁰ Many other objectors went to prison because, unlike England which granted absolute as well as conditional exemption,⁴¹ the United States did not recognize the non-orthodox or philosophical objector, or permit him to remain in teaching or similar service employments.⁴² Still other objectors who tried to cooperate found themselves caught up in a military organization, walked off the job and went to prison.⁴³

The experience of the Peace Churches in trying to work with the military was not a satisfactory one and a decision was made, at the end of the war, not to again operate Civilian Public Service camps. Consequently, when Selective Service was again introduced in 1948 the statute, following the British pattern, provided complete exemption for a conscientious objector who satisfied the statutory test. Even this did not satisfy some religious objectors, whose opposition applied to all war and preparation for war, including the Selective Service System. These men

³⁸ *Selective Service System, Background of Selective Service* (Spec. Monographs 1947, 1950); *Journals of Congress* 159 (1800); Russell, *Development of Conscientious Objector Recognition in the United States*, 20 GEO. WASH. L. REV. 409 (1952).

³⁹ See note 38 *supra* and SIBLEY AND JACOB, *CONSCRIPTION OF CONSCIENCE* (1952).

⁴⁰ *Ibid.*, and bibliography therein.

⁴¹ See HAYES, *CHALLENGE OF CONSCIENCE* (1949).

⁴² *Berman v. United States*, 156 F.2d 377 (9th Cir. 1946), *cert. denied*, 329 U.S. 795 (1946); *United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943).

⁴³ *Atherton v. United States*, 176 F.2d 835 (9th Cir. 1949), *cert. denied*, 338 U.S. 938 (1950); *Roodenko v. United States*, 147 F.2d 752 (10th Cir. 1944), *cert. denied*, 324 U.S. 860 (1945).

totally refused to cooperate (register) and were generally convicted of violating the Draft Act, and sent to prison.⁴⁴

With the extension of Selective Service and the coming of the Korean War, it was considered that exemption could no longer be granted. An alternative service program was consequently set up. Under this program once a registrant was classified as a conscientious objector, he was allowed to suggest three jobs which he would prefer to perform in lieu of military service. Jobs in governmental agencies or in private charities recognized by Selective Service were among the alternatives available to him. If his Draft board approved one of these alternatives he would be assigned to it when his number came up. If approval was not granted, the Draft Board could submit three alternatives and the parties would finally agree through arbitration on the work to be performed. When the conscientious objector finished two years of assigned service he was acquitted of all obligations under Selective Service. This system was eminently superior to the previous plans, and the assignee's talents were frequently used where they would best serve the community—lawyers as clerks to judges, doctors in hospitals, sociologists in reformatories, and many specialists in work of international aid and reconstruction abroad. This experience has not yet been fully recorded.

But history, however important, is not here our primary concern. Here we shall examine the legal questions raised by conscientious objection, observe the attempts to solve these problems, and note the unresolved issues which still remain. In the space at our disposal we can make a mere outline.

These legal issues seem to group themselves around five points: (a) procedural due process in conscientious objector cases, (b) conscientious objection as a constitutional right, (c) the meaning of the first amendment and the relationship of conscience to both the establishment of religion and free exercise clauses, (d) the appropriate place of conscience in our culture, and (e) the challenge posed to the Supreme Court's refusal to protect citizens against federal action in *any* field.

The Supreme Court early held that conscription (and the ex-

⁴⁴ After the war experience some of the Peace Churches openly counselled their young people to refuse to register if their conscience dictated that any cooperation with Selective Service was part of the war effort. Declaration of a called Meeting of Friends, Earlham College, Richmond, Indiana, July 20-22, 1948.

Sibley and Jacob state that approximately 16,000 persons were prosecuted for violating the Selective Training and Service Act during the Second World War and that at least 5,516 of them were conscientious objectors. CONSCRIPTION OF CONSCIENCE 332-34 (1952). The proportion was much greater under peacetime conscription after 1948. See typical cases: *United States v. Palmer*, 223 F.2d 893 (3rd Cir. 1955), *cert. denied*, 350 U.S. 873 (1955); *United States v. Kime*, 188 F.2d 677 (7th Cir. 1951), *cert. denied*, 342 U.S. 823 (1951); *United States v. Henderson*, 180 F.2d 711 (7th Cir. 1950), *cert. denied*, 339 U.S. 963 (1950); *Michener v. United States*, 134 F.2d 712 (10th Cir. 1950). See Cornell, *Exemption from the Draft*, 56 YALE L.J. 258 (1947).

emption of religious groups from it) was constitutional and, although it has been argued that *peacetime* conscription is unconstitutional, the cases are to the contrary. That issue will not be discussed here. It, and the cases, are fully reviewed elsewhere.⁴⁵

(a) Procedural Due Process in Conscientious Objector Cases.

Religious pacifists have been, with one exception later to be noted, fully protected in procedural due process. This should not be surprising, for the Supreme Court has generally protected persons more adequately in procedural due process than in substantive rights.⁴⁶ Accordingly, the Supreme Court has required that classification procedure should be adequate, should be based on substantial evidence, and should at some point provide for court review.⁴⁷ It went so far as to demand that the registrant's F.B.I. file be made known to him, thus creating the first break in the wall of secrecy surrounding F.B.I. dossiers and foreshadowing similar cases in other fields.⁴⁸

In only one type of case which the author tried did the courts fail to guarantee due procedure protection. Typical of such a case was

⁴⁵ Selective Draft Law Cases, 245 U.S. 366 (1918); Freeman, *The Constitutionality of Peacetime Conscription*, 31 VA. L. REV. 40 (1944). Cf. Richter v. United States, 181 F.2d 591 (9th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950); United States v. Henderson, 180 F.2d 711 (7th Cir. 1950), *cert. denied*, 339 U.S. 963 (1950); Rase v. United States, 129 F.2d 204 (6th Cir. 1942); Montgomery, *Peacetime Compulsory Military Training*, 31 VA. L. REV. 628 (1945). See cases involving the war power in time of peace, Hamilton v. Board of Regents, 293 U.S. 245 (1934); Meyer v. Nebraska, 262 U.S. 390 (1923); Ludecke v. Watkins, 335 U.S. 160 (1948) (dissent).

⁴⁶ Payne v. Arkansas, 356 U.S. 560 (1958); Moore v. State, 355 U.S. 225 (1957); Rowoldt v. Perfetto, 355 U.S. 115 (1957); Service v. Dulles, 354 U.S. 363 (1957); Watkins v. United States, 354 U.S. 178 (1957); Mesarosh v. United States, 352 U.S. 1 (1956); Bridges v. Wixon, 326 U.S. 135 (1945). See MENDELSON, *THE CONSTITUTION AND THE SUPREME COURT* 228-330 (1959).

⁴⁷ Gonzales v. United States, 348 U.S. 407 (1955); Simmons v. United States, 348 U.S. 397 (1955); Witmer v. United States, 348 U.S. 375 (1955); (The Board must show a basis in fact to defeat the registrant's statement of belief; proof that a person will participate in a theocratic war is insufficient to defeat his sincerity of conscience; he must be given a copy of any unfavorable F.B.I. report); Dickinson v. United States, 346 U.S. 389 (1953) (There must be affirmative evidence in the record to support the local board's determination, otherwise its decision will be upset); Estep v. United States, 327 U.S. 114 (1945) (Where the classification process was complete and the order was unlawful it could be challenged as a defense in a criminal prosecution; the statute did not by using the word 'final' remove an erroneous order from review). See the many lower court cases discussed in Note, 50 NW. U.L. REV. 660 (1955). See also Cox v. United States, 332 U.S. 442 (1947); Sunal v. Large, 332 U.S. 174 (1947); Gibson v. United States, 329 U.S. 338 (1946); Eagles v. United States, 329 U.S. 304 (1946).

⁴⁸ United States v. Nugent, 346 U.S. 1 (1953). Cf. Jencks v. United States, 353 U.S. 657 (1957).

United States v. Palmer.⁴⁹ The record conclusively showed that the registrant was a conscientious objector, was a divinity student, was sincere, and had all the material necessary to classification in his file. Yet, because his conscience would not permit him to cooperate with Selective Service, he failed to *ask* for the proper classification or take an appeal. The Court held that he had not "exhausted his administrative remedies" and could not defend in the courts against a criminal conviction. The Court of Appeals asked the case to be twice argued; it was decided 4-3. The Supreme Court avoided the issue by denying certiorari. I still believe the decision is contrary to the great body of law on exhaustion in other fields.

(b) Conscientious Objection as a Constitutional Right.

The first amendment to the Constitution states that "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.*" Since by definition "conscience" is the religious or inner guide determining what is morally right and wrong, the issue is immediately raised whether "conscience" is a first amendment right, the free exercise of which cannot be prohibited. We all admit that any constitutional right, *e.g.*, free speech, is relative and can be regulated.⁵⁰ But regulation is vastly different from prohibition. In other fields regulation has been stricken down when so extensive as to amount to prohibition. To grant the right of regulation does not deny that the source of the regulated right is the Constitution and not the legislature.⁵¹

Let us then look to the history of the first amendment and the Supreme Court decisions respecting the right of conscientious objection to determine whether the right is constitutionally guaranteed. I have heretofore recorded my belief, based on as extensive historical research and as sound jurisprudence as I can exercise, that the right is constitutional and within the first amendment. This conclusion is based on a careful examination of the pre-Constitution history, the constitutional debates and drafts, the resolutions of ratification and the state constitutions. All of these show that "free exercise thereof" was intended to embody freedom of conscience.⁵²

The Supreme Court record is quite inconclusive on this matter, though I believe that correctly understood it will eventually define the right as constitutional. The Court held in *United States v. MacIntosh*⁵³ and stated by way of dictum in *Hamilton v. Board of Regents*⁵⁴ that exemption from military service for conscientious objectors was a matter

⁴⁹ 223 F.2d 893 (3rd Cir. 1955), *cert. denied*, 350 U.S. 873 (1955).

⁵⁰ KONVITZ, *FUNDAMENTAL LIBERTIES OF A FREE PEOPLE* 209-16, 275-341 (1957).

⁵¹ See note 36 *supra*.

⁵² See Freeman, *A Remonstrance for Conscience*, 106 U. OF PA. L. REV. 806, 808-13, n. 3-32 (1958).

⁵³ 283 U.S. 605 (1931).

⁵⁴ 293 U.S. 245 (1934).

of legislative grace. But both cases involved what the Court deemed a "privilege," the opportunity for an alien to become a citizen (*MacIntosh*) or the chance to attend a tuition-free university (*Hamilton*). I have elsewhere shown why I believe that any "privilege" argument as to civil liberties is unsound.⁵⁵ Furthermore, the *Hamilton* case was distinguished in the second flag salute case⁵⁶ as not applicable to compulsory action, e.g. the Draft. The *MacIntosh* case was overruled in the *Girourard* case⁵⁷ in language that made the minority opinion in the *MacIntosh* case express the present view of the Supreme Court. This makes the reasoning of the minority in the *MacIntosh* case take on new significance; and it underlines afresh the remark of both the majority and minority in that case, that Congress had meticulously respected conscience and accommodated military requirements to it as a practical application of our constitutional tradition of religious freedom. The minority's argument was that, since the immigrant (privilege) and the public officer's (citizen's right) oaths were the same, a constitutional issue was presented. There is a threefold result: (1) conscience is clearly protected by the first amendment, (2) duties to God are superior to those owed to the State, and (3) a religious person may constitutionally fulfill his beliefs through acts.

Although the lower courts have consistently followed the dictum that conscientious objection is a matter of legislative grace⁵⁸ and at least one conscientious objector writer has agreed,⁵⁹ I believe this is unsound, particularly in the light of other Supreme Court recognitions of conscience and the right to act in reliance thereon.⁶⁰ It would appear that the Supreme Court will not squarely face the full problem of conscience until it determines whether conscientious objection is protected as a constitutional right under the first amendment.

(c) The Meaning of the First Amendment—the Relation of Conscience to the "Establishment of Religion" and "Free Exercise" Clauses.

At a previous point we have illustrated the major application of

⁵⁵ Freeman, *Civil Liberties and You*, 10 SYRACUSE L. REV. 1 (1958).

⁵⁶ Board of Educ. v. Barnette, 319 U.S. 624 (1943).

⁵⁷ *Girourard v. United States*, 328 U.S. 61 (1946). See also *Schneiderman v. United States*, 320 U.S. 118 (1943).

⁵⁸ *George v. United States*, 196 F.2d 445 (9th Cir. 1952), *cert. denied*, 344 U.S. 843 (1952); *United States v. Kime*, 188 F.2d 677 (7th Cir. 1951), *cert. denied*, 342 U.S. 823 (1952); *Richter v. United States*, 181 F.2d 591 (9th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950); *Michener v. United States*, 184 F.2d 712 (10th Cir. 1950).

⁵⁹ CORNELL, *THE CONSCIENTIOUS OBJECTOR AND THE LAW* (1943); Cornell, *Exemption from the Draft*, *supra*, note 44.

⁶⁰ *Girourard v. United States*, 328 U.S. 61, 68 (1946); *Thomas v. Collins*, 323 U.S. 516, 531 (1945); *Schneiderman v. United States*, 320 U.S. 118, 135 (1943); *Davis v. Beason*, 133 U.S. 333, 342 (1890); *Reynolds v. United States*,

the constitutional provision against establishing a state religion — the “wall of separation between Church and State” cases. An unresolved issue in this field is presented by the conscientious objector statutes and cases. The present statute recognizes an objector’s immunity to military service only if his position is taken because of religious training and belief. Religious belief is then defined as belief in “a Divine Being.” As we have also outlined in the brief history of conscientious objection, local boards try the religious sincerity of a person. I have been told again and again by a draft board or court that no Catholic or no Jew, or no Buddhist can be a sincere conscientious objector.

The Bible is literally sprinkled with recognitions that “only God knoweth the secrets of the heart” and the Supreme Court has frequently warned that you cannot try sincerity without testing doctrinal verity and that heresy trials are contrary to the American system.⁶¹ It is respectfully submitted, however, that the Selective Service Law by testing a person’s religious sincerity within these terms is undermining the basic concept of the Separation of Church and State, the non-establishment of a state religion, and the theory against heresy trials.

The concept of a “Divine Being” is distinctly a Judeo-Christian concept. Over three-fourths of the religious people of the world have no such stereotyped belief. Islam does not define God in terms of a “Being”; Buddhism takes its stand in favor of a great First Cause but not necessarily a “Being”; Hinduism has physical “manifestations” of God without confining God to a “Being,” and so the catalogue could continue.⁶² Even some Christians believe in the Divinity of Being and Becoming rather than in a physical Being.

By using the “Divine Being” test, the Selective Service Law clearly establishes a “state religion” and religious belief. Many sincere conscientious objectors have been refused exemption because they could not come under this definition of religion, the earlier attempt to define the protection broadly enough to cover all religions having been rejected in the 1948 Selective Service Act and cases thereunder.⁶³ Some believe that this narrow interpretation is merely a reflection of earlier decisions of

98 U.S. 145, 164 (1878); *Everson v. Board of Educ.*, 330 U.S. 1, 35-38 (1947) (dissent). Cf. *Frankfurter, J., in United States v. Nugent*, 346 U.S. 1, 12-13 (1953); *Board of Educ. v. Barnette*, 319 U.S. 624, 646 (1943).

⁶¹ *Jeremiah* 17:10, *Psalms* 44:21. See note 4, *supra*.

⁶² See BURTT, *supra* note 30.

⁶³ The 1940 Selective Service Act merely required religious training and belief. It did not require belief in a Divine Being. In *United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943), the Second Circuit rejected the restrictive interpretation urged by Selective Service. Cf. *Berman v. United States*, 156 F.2d 377 (9th Cir. 1946), *cert. denied*, 329 U.S. 795 (1946), and Judge Denman’s dissent therein.

The 1948 Act adopted the Selective Service language (Divine Being). Typical recent cases are: *Clark v. United States*, 236 F.2d 13 (9th Cir. 1956), *cert. denied*, 352 U.S. 882 (1956); *Davidson v. United States*, 218 F.2d 609 (9th Cir. 1954), *cert. denied*, 350 U.S. 887 (1955).

the Supreme Court stating that we are a "Christian nation."⁶⁴ If those cases were intended to refer to more than our general cultural pattern, and meant to establish that only the Christian religion would be protected, they are clearly wrong.⁶⁵

It is my wish that we abandon any official definition of religion, and cease testing religious sincerity and verity by local boards; I should like for us to consider the person who arrives at his position through philosophy and the intellect as worthy of as much respect as one whose position is "religious." I might even dare to hope that some day America will be true enough to its great ideal to give up compulsory draft laws and allow complete freedom of religious and intellectual belief.

Conscientious objectors also pose a question with regard to the "free exercise" clause of the first amendment which the Supreme Court has not yet faced. Beginning with the Court's attempt to prevent polygamous practices while protecting religious belief, and continuing into some of the Jehovah's Witness cases, the Supreme Court has stated that religious belief is absolute but that action taken pursuant to religious belief is not.⁶⁶ It is to be noted that in none of these cases, except the polygamy type, has the rule in fact prevented the religious act. It is my humble opinion, for the reasons I have stated elsewhere, that though it is proper to distinguish between beliefs as *absolute* and acts as *non-absolute*, it is improper to thereupon conclude that religious acts can be prohibited or that making them a crime prevents the assertion of religious liberty as a defense. The *Reynolds* case should be disavowed in this implication.⁶⁷

In a whole series of cases conscientious objectors have tried to challenge criminal laws on the ground that they violate religious freedom.⁶⁸ They seem to be met by the answer that once an *act* is defined as criminal the right to engage in that act is not a part of the right of religious freedom. By refusing to hear these cases the Supreme Court has appeared to sanction this reasoning. Sooner or later the Court is going to have to face this problem. To any truly religious person it is not enough to be allowed to believe what he will. All great religion

⁶⁴ *E.g.*, *Mormon Church v. United States*, 136 U.S. 1 (1890); *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1878).

⁶⁵ Any religious "test oath" is clearly prohibited by the Constitution. U.S. CONST. art. VI, cl. 3; *Girouard v. United States*, 328 U.S. 61, 68 (1946).

⁶⁶ See note 6, *supra*.

⁶⁷ *Reynolds v. United States*, 98 U.S. 145 (1878). See pp. 33-56 of petition for certiorari to U. S. Supreme Court in *Warren v. United States*, 338 U.S. 947 (1950) (father convicted, over defense of conscience, of counselling son not to register with Selective Service); Freeman, *Civil Liberties and You*, *supra* note 55; Freeman, *A Remonstrance for Conscience*, *supra* note 52. See supporting expressions in *American Communications Assn. v. Douds*, 339 U.S. 382, 399 (1950); *United States v. Ballard*, 322 U.S. 78, 86 (1944); *Near v. Minnesota*, 283 U.S. 697, 720-21 (1931).

⁶⁸ See note 77 *infra*.

requires him to act on his belief. The first amendment does not define its protection in terms of *belief* but in terms of "*exercise*" or *action*. The issue goes beyond the conscientious objector for it affects the very theory of religious obligation and religious liberty.

It can be categorically stated that the history surrounding the adoption of the first amendment proves that the right of conscience was the very center of the intended protection.⁶⁹

(d) The Appropriate Place of Conscience in our Culture.

Recently the writer has developed the thesis with which almost every authority on constitutional law agrees, that the freedoms of the first amendment constitute the underlying faith of America as a liberal democracy—the faith that different religious views, different intellectual ideas, different political doctrines should be tolerated (nay, even encouraged) as the surest way to find the best course for America and the strongest and most reliant citizenry.⁷⁰ Conscience is the very center of this theory of freedom and has been referred to by the Supreme Court as the producer of the first amendment.⁷¹ Both the Supreme Court majority, which believes that only the "fundamental" rights of the first ten amendments are carried forward to the States through the fourteenth amendment, and the minority who would more broadly protect liberties, view "free exercise" of religion as fundamental.⁷² Therefore, by constitutional definition there is a "Firstness of the First Amendment" (and conscience) in our American system.⁷³

The American system and Constitution are based on a cultural heritage. They are Judeo-Christian in religious tradition, Greco-Roman in philosophy, and Anglo-American in politics. Americans fall heir to the great prophetic visions of the Old Testament, the violations of law by Jesus for conscience sake, his refusal to become a temporal Messiah, his reliance on love of enemies as the alchemy of change, the period of the Christian martyrs when the church was wholly pacifist, the great Catholic refusal to subordinate Church to State, the dissident religious groups which championed religious freedom against a state church. All of these produced our first amendment. That amendment is grounded in Sophocles' great defense of conscience in *Antigone*. It is steeped in the wisdom of Socrates' *Apology*, Aristotle's *Ethics* and Cicero's *De*

⁶⁹ See note 52 *supra*.

⁷⁰ KAUPER, *FRONTIERS OF CONSTITUTIONAL LIBERTY* (1956); KONVITZ, *FUNDAMENTAL LIBERTIES OF A FREE PEOPLE* (1957); Freeman, *Civil Liberties and You*, *supra* note 55.

⁷¹ *United States v. Nugent*, 346 U.S. 1, 12 (1953); *Girourard v. United States*, 328 U.S. 61, 68 (1946).

⁷² *Adamson v. California*, 332 U.S. 46 (1947); *Palko v. Connecticut*, 302 U.S. 319 (1937); Crosskey and Fairman, *Legislative History and the Constitutional Limitation on State Authority*, 22 U. OF CHI. L. REV. 1, 144 (1954); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

⁷³ Cahn, *The Firstness of the First Amendment*, 65 YALE L. J. 464 (1956).

Republica, all of which define a right of conscience against the State. Our tradition is superbly bottomed on John Milton, John Locke, Roger Williams, William Penn, Tom Paine and Thomas Jefferson.⁷⁴ In fact, the Supreme Court doctrine of Free Speech as "Truth in the Market Place" is but a paraphrase of Milton's famous:

give me the liberty to know, to utter and to argue freely, according to *conscience*, above all liberties. . . . And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting, to misdoubt her strength. Let her and falsehood grapple. Who ever knew Truth put to the worse in a free and open encounter?

(e) Conscience Must Continue to Challenge the Supreme Court to Protect First Amendment Liberties Against Federal Action.

The protection which the Supreme Court has given religion against state action, as reviewed above, is rather magnificent. It will come as a shock to many that not once in its 175 year history has the Supreme Court clearly protected religious freedom (or any other of the first amendment freedoms) against *federal* legislation and some judges speak for almost total deference to congressional will.⁷⁵ In other articles I have criticised the Court's refusal to protect other basic freedoms.⁷⁶ I have participated in a long series of cases which have asked the Supreme Court to protect religious conscience, and to face the important issues outlined above. The record is an unbroken one of refusal to hear the cases.⁷⁷ It is most difficult to get these problems before the Court. Taking a case to the Court is very expensive and there is no national

⁷⁴ This culture is reviewed in Freeman, *A Remonstrance for Conscience*, *supra* note 52, at 813-16.

⁷⁵ There is a slight tendency toward protection in *Yates v. United States*, 354 U.S. 298 (1957); *United States v. Lovett*, 328 U.S. 303 (1946); *Ballard v. United States*, 322 U.S. 78 (1944). The deference of Frankfurter, J., to Congress is well known, see, *e.g.*, *Dennis v. United States*, 341 U.S. 494, 525 (1951).

⁷⁶ *E.g.*, Freeman, *Genesis, Exodus, Leviticus*, 28 CORNELL L. Q. 414 (1942), involving Japanese-American detention camps.

⁷⁷ *Gara v. United States*, 178 F.2d 38 (6th Cir. 1949), *aff'd by an equally divided Court*, 340 U.S. 857 (1950) (dean of students encouraging student to obey his conscience in not registering); *Clark v. United States*, 236 F.2d 13 (9th Cir. 1956), *cert. denied*, 352 U.S. 882 (1956) (a Unitarian challenging the Supreme Being clause); *Davidson v. United States*, 218 F.2d 609 (9th Cir. 1954), *remanded*, 349 U.S. 918 (1955), *reaff'd*, 225 F.2d 836 (1955), *cert. denied*, 350 U.S. 887 (1956) (attempt to question the Supreme Being clause); *Palmer v. United States*, 223 F.2d 893 (3rd Cir. 1955), *cert. denied*, 350 U.S. 873 (1955) (refusal to exhaust administrative remedies for conscience reasons); *George v. United States*, 196 F.2d 445 (9th Cir. 1952), *cert. denied*, 344 U.S. 843 (1952) (refusal to report for induction and failure to file classification questionnaire on grounds of conscience); *United States v. Kime*, 188 F.2d 677 (7th Cir. 1951), *cert. denied*, 342 U.S. 823 (1952) (failing to carry registration card for conscience reasons); *Richter v. United States*, 181 F.2d 591 (9th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950) (refusal to register on ground draft act violated first amendment); *Cannon v.*

organization to pay the bill. An individual usually has to go to prison even to frame the issue. Unlike cases involving state action where the Supreme Court may be reached by right of direct appeal, actions against the nation must meet the almost insurmountable hurdle of certiorari. The procedural road blocks to raising substantive issues are great.⁷⁸

The conscientious objector considers that he is carrying the torch for all constitutional freedoms in challenging the Supreme Court to once protect religious freedom against the federal government.

2. *Exemption of Ministers from Military Service and Jury Duty.*

In pagan society, no matter how civilized, the gods and their religious priests were the servants of a state. Jupiter and Mars, Woden and Thor, Krishna and Kali were gods of a particular people fighting against the gods and people of their enemies. Even the great religions which preached one god, love and a brotherhood of all men, still carried over the idea of a holy war in defense of their religious tenets (*e.g.*, the Crusades of Christianity and Jihad of Islam). Yet these great religions sought to reverse the pattern and make government and the church synonymous. The Catholic Church asserted its control over the temporal emperors during the Middle Ages and the Moslem Caliphate retained, until present times, the unity of temporal and spiritual power.

When it became apparent that the Church was not going to control government, that when it did it took on worldly aspects, and that theretofore the functions of church and state might be different with neither controlling the other, an uneasy truce between the two was worked out. Without expressly so stating, the state recognized that many of its functions were, in the eyes of high religion, at best non-religious and at worst downright sinful (*e.g.*, "Judge not that ye be not judged," "If one shall take thy cloak, give him thy coat also," "Love thy enemies and do good to them who hate you," "If one shall smite thee on thy left cheek turn to him thy right cheek also," "Render unto Caesar the things that are Caesar's and unto God the things that are God's," etc., etc.)

United States, 181 F.2d 354 (9th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950) (refusal to register on ground draft act violated first amendment); *Frantz v. United States*, 180 F.2d 711 (7th Cir. 1950), *cert. denied*, 339 U.S. 963 (1950) (refusal of Quakers to complete Selective Service forms, though notifying draft boards, as military action contrary to conscience); *Warren v. United States*, 177 F.2d 596 (10th Cir. 1949), *cert. denied*, 338 U.S. 947 (1950) (father, a religious objector, counselling son not to register for draft; son registered; father convicted of counselling draft violation, over defense of conscience); *United States v. Atherton*, 176 F.2d 835 (9th Cir. 1949), *cert. denied*, 338 U.S. 938 (1950) (refusing to remain in C.P.S. camp).

⁷⁸ Three of the above cases are most astonishing. In *Gara* and *Warren* the convictions were for speech only. In *Palmer*, a recognized sincere conscientious objector was convicted simply because his conscience would not permit him to exhaust his remedies within Selective Service.

Unwilling to release the average citizen from his temporal obligations merely because he was religious, the State seemed to concede to the clergy a special position—that they gave their total lives to God and ought not to be required to do any inconsistent temporal act. The corollary seemed to be that ordinary citizens were only half God's and need not be granted full religious exemption. In this regard the truce rather accepted the Catholic-confessional churches view that man was born in original sin and could only be saved through the priesthood which was God's vicar on earth and like Him, holy. It did not accept the religious free thinkers who viewed man as a son of God, as his own priest, as a "church of one" with God. It may be denied that theology is accepted in and becomes a part of jurisprudence, but that is precisely what I think has happened.

From the earliest times clergymen have been exempted from jury duty. It is hard to find legal material outlining the reasons for the exemption. Some have suggested that it is similar to the exemption given the lawyer, *i.e.*, that he is a confidant with the privilege against testifying. But this does not seem the true basis since in England jury duty is excused though no witness privilege exists. The reason would seem to be that jury duty interferes with the minister's primary service to the community since it involves "judging" individuals.⁷⁹

It has likewise been the uniform practice to exempt ministers (and theology students) from military service.⁸⁰ No great problem was raised by these exemptions until the Second World War, when two trends evidenced themselves and presented the courts with a series of difficult questions: (1) Some pacifist ministers refused to accept exemption not open to all religious men and (2) the Jehovah's Witnesses looked upon many persons as ministers, who would not come within the normal church definition. If a minister refused his exemption, *e.g.*, by refusing to register, he was generally treated as any other citizen, and convicted, though in the case of some of the famous pastors, the state simply failed to prosecute.⁸¹ The exemption of ministers and the process of classification was generally upheld.⁸² The use of theological panels to deter-

⁷⁹ See N.Y. MCK. UNCONSOL. § 3911 (1949); N.Y. JUDICIARY L. §§ 599, 665 (1948); OHIO REV. CODE § 2313.34 (1953). In *United States v. Hillyard*, 52 F. Supp. 612 (E.D. Wash. 1943), it was held that the first amendment permits a Jehovah's Witness to refuse jury duty for religious reasons.

⁸⁰ 62 Stat. 611, 50 U.S.C. § 456(g) (1948); 54 Stat. 888 (1940); 40 Stat. 78 (1917); Cornell, *Exemption From the Draft*, *supra* note 44, at 263-66.

⁸¹ See Konwitz, *The Case of the Eight Divinity Students*, 1 BILL OF RIGHTS REV. 196 (1941). A. J. Muste, John Haynes Holmes and others were not prosecuted.

⁸² *Martin v. United States*, 190 F.2d 775 (4th Cir. 1951), *cert. denied*, 342 U.S. 872 (1951); *United States v. Mroz*, 136 F.2d 221 (7th Cir. 1943), *appeal dismissed*, 320 U.S. 805 (1943); *Rase v. United States*, 129 F.2d 204 (6th Cir. 1942). See comment in *Estep v. United States*, 327 U.S. 114, 118 (1945).

mine ministerial status was approved.⁸³ The Supreme Court carefully protected the rights of Jehovah's Witnesses by requiring substantial evidence before denying the exemption, but admitted that more than a mere ministerial claim was required.⁸⁴ Many Jehovah's Witnesses were denied exemption and went to jail.

Many pastors were recruited as chaplains, went through military training and discipline, and served with distinction in the field.

The pattern of ministerial exemption has been satisfactory to most church bodies. There has been little movement to ask for change.

3. *Exemption from Oaths.*

It has been common for centuries to require the taking of oaths as a condition to testifying in courts of law and as a condition to admission to public office. Quakers and others forbidden by conscience to take an oath⁸⁵ were unable until about the eighteen hundreds to testify in court or hold public office. Gradually statutes were enacted permitting persons who could not take an oath for religious reasons to affirm instead. A typical provision since copied by many states was written into the Illinois Constitution of 1870:

No person shall be denied any civil or political right, privilege, or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations.⁸⁶

Many members of the Brethren, Quaker, and other religious sects have conscientious objections to making affirmations as well as to taking oaths. They believe that the obligation to tell the truth is the same inside and outside a courtroom. They believe that any procedure, whether by oath or affirmation, to make the obligation to tell the truth in a courtroom somehow different or more special than the obligation in ordinary life cheapens the basic general obligation and practice of people to be truthful at all times.⁸⁷

⁸³ *Eagles v. United States*, 329 U.S. 304 (1946).

⁸⁴ *Gonzales v. United States*, 348 U.S. 407 (1955), and related cases in 348 U.S. 397, 385, 375; *Dickinson v. United States*, 346 U.S. 389 (1953); *United States v. Nugent*, 346 U.S. 1 (1953).

⁸⁵ "But let your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil." *Matthew* 5:37.

⁸⁶ Art. II, § 3. Federal and state statutes are collected in 6 WIGMORE, EVIDENCE § 1828 (3rd ed. 1940). The history of the statutory development is traced in White, *Oaths in Judicial Proceedings and Their Effect Upon the Competency of Witnesses*, 42 AM. L. REG. 373 (1903). See also Swancara, *The Surviving Religious Test*, 18 ST. LOUIS L. REV. 105 (1932). Religious belief in a God or in divine punishment is generally no longer a condition to testimonial competency in court. *Gillars v. United States*, 182 F.2d 962 (D.C. 1950). See 6 WIGMORE, EVIDENCE §§ 1816-23 (3rd ed. 1940).

⁸⁷ The view of the Brethren and Quakers is similar to that of a young girl questioned as to her knowledge of an oath who replied: "I would be punished if I told a lie without taking an oath. I do not know the difference between telling

In a case I handled in 1950⁸⁸ a member of the Brethren church refused for these reasons to raise his hand to make either a solemn affirmation or an oath. He was not allowed to testify. This rule in the federal courts⁸⁹ has since been changed by *Moore v. United States*.⁹⁰ In a criminal prosecution of a conscientious objector for refusing to submit to induction into the armed forces, the defendant and witnesses tendered by him refused on religious grounds either to take an oath or to make "a solemn affirmation." The Supreme Court held that the trial court erred in denying the right to testify. It said there is no requirement that the word "solemnly" be used in the affirmation. The court apparently held that an affirmation is solely a procedure for laying the groundwork for a possible perjury conviction if the witness lies and does not make the occasion for giving testimony in court any more "solemn" or call for an attitude toward truth-telling any different than in ordinary life.

4. *Exemption from Sunday Laws.*

From the beginning of colonial history most of the colonies and states have had Sunday observance laws. The early colonists may have sought freedom from religious regulation in the mother country, but they did not intend to permit men to become irreligious in America. They carried community of church and state, the weapon of heresy, and compulsory church attendance to the new land.⁹¹ These laws became a recognized part of the legal pattern before there were enough Jews or non-communicants to pose any question as to the right to observe the Christian Sabbath as a day of rest and a "holy" day.

It was only after the first amendment guaranteed religious freedom that the question arose whether those who observed no Sabbath or observed a different Sabbath could refuse to obey Sunday observance laws. The development of the law in this field seems almost accidental, without any clear facing of the problem of religious freedom. In 1858 Judge Stephen J. Field filed a dissenting opinion in a California case holding a law preventing work on Sunday invalid. His argument was that the fixing of the Christian Sabbath as a day of rest and requiring Sunday observance was not a regulation of a religious matter but merely a civil regulation. Three years later his view became the rule of the majority.⁹² Later, when he became Supreme Court Justice he wrote his

the truth here and elsewhere God would punish me if I told a lie out of court." *Commonwealth v. Ellenger*, 1 Brewst. 352 (Pa. 1867).

⁸⁸ *United States v. Henderson*, 180 F.2d 711 (7th Cir. 1950), *cert. denied*, 339 U.S. 963 (1950).

⁸⁹ Cf. N.Y. CIV. PRAC. ACT § 363.

⁹⁰ 348 U.S. 966 (1955), *per curiam reversing* 217 F.2d 428 (7th Cir. 1954).

⁹¹ STOKES, CHURCH AND STATE IN THE UNITED STATES (1950); SWEET, RELIGION IN COLONIAL AMERICA (1946); SWEET, THE STORY OF RELIGION IN AMERICA (1939): Note, 25 So. CAL. L. REV. 131 (1951).

⁹² *Ex parte Andrews*, 18 Cal. 679 (1861); *Ex parte Newman*, 9 Cal. 502

views into law as those of the Court.⁹³ There was a point at which the Supreme Court tended, further, to reflect the propriety of these laws as based on the general social matrix of the country—that is, that we are a Christian nation and our institutions should be Christian institutions, which position we have already criticized.⁹⁴ Gradually, in this early period the legality of these laws became generally sustained under the police power as regulations for health, morals and good order, and this view is largely followed today.⁹⁵

Two patterns seem to appear in the statutes. New York may be taken as one example. It required Sunday observance and prevented any labor except that necessary for charity on such day; it permitted religious observance of another day but prevented the doing of business or the sale of property on the Christian Sabbath. A crazy-quilt of decisions has grown up under this law.⁹⁶ A strong movement developed in 1950-52 to change these laws, but a joint committee recommendation was rejected by the legislature.

Another group of states early recognized that to compel religious observance of the Christian Sabbath would be to regulate religion and be invalid. They therefore generally provided that a choice be allowed of one day of Sabbath in seven. Ohio led this movement, which is now embodied in the statutes of some twelve states.⁹⁷ Even here, the restrictions imposed are likewise upheld under the general police power for health, morals and good order.⁹⁸

(1858). See Note, 64 HARV. L. REV. 1194 (1951).

⁹³ *Petit v. Minnesota*, 177 U.S. 164 (1900); *Hennington v. Georgia*, 163 U.S. 299 (1896); *Soon Hing v. Crowley*, 113 U.S. 703 (1885).

⁹⁴ *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

⁹⁵ *People v. Havnor*, 149 N.Y. 195, 43 N.E. 541 (1896); *State v. Grabinsky*, 33 Wash. 2d 603, 206 P.2d 1022 (1949); Note, 3 CATHOLIC U. L. REV. 136 (1953); Note, 34 DICTA 182 (1957); Note, 25 So. CAL. L. REV. 131 (1951). The same general pattern obtains in England and Canada; Note, *Use of Place Contrary to Sunday Law*, 72 L.Q. REV. 317 (1956); *Closing Stores on Holy Days*, Note 34 CAN. B. REV. 81 (1956). See generally, LEWIS, SUNDAY LEGISLATION: ITS HISTORY TO THE PRESENT TIME AND ITS RESULTS (1902); Czarra, *Sunday Statutes in a Modern Community*, 61 YALE L.J. 427 (1952).

⁹⁶ See N.Y. PENAL L. § 2143. At one time a man could not fish on Sunday, even in his private club. *People v. Moses*, 140 N.Y. 214, 35 N.E. 499 (1893). Consistently, orthodox Jews were prevented from keeping their stores open on Sunday. *People v. Friedman*, 302 N.Y. 75, 96 N.E.2d 184 (1950), *appeal dismissed*, 341 U.S. 907 (1951). To get around the no-sale-of-property provision, real property was once held not to be "property." *People v. Dunford*, 207 N.Y. 17, 100 N.E. 433 (1912). See PFEFFER, CHURCH, STATE AND FREEDOM (1953); Note, 6 SYRACUSE L. REV. 362 (1955).

⁹⁷ *Johns v. State*, 78 Ind. 332 (1881); *Canton v. Nist*, 9 Ohio St. 439 (1859); Note, 3 ST. LOUIS U.L.J. 300 (1955).

⁹⁸ *Carr v. State*, 175 Ind. 241, 93 N.E. 1071 (1911); *State v. Powell*, 58 Ohio St. 324, 50 N.E. 900 (1898); Note, 25 So. CAL. L. REV. 131 (1951).

It is difficult to formulate the course which should now be followed in this matter. Originally and theoretically there can be little doubt that the proper decision would have been that no man should be compelled to follow a pattern other than that dictated by his religion. You cannot make men religious by force. I write this portion of the article in Egypt, a country eighty percent Moslem. The Moslem Sabbath is Friday; Moslem jurisprudence requires the cessation of work, the closing of shops and the non-making of contracts. Yet the law here does not compel Christians or non-Moslems to observe Friday as a day of rest or a Sabbath and does not prevent their business or contracts. This is true religious tolerance.

On the other hand, a series of factors have recently developed in America, which may have lessened the problem and given cause for saying that Sunday laws are truly civil and non-religious. The laws now exempt more and more activities: frequently, only the part of the day occupied by Church services is covered; for a growing percentage of the people Sunday is a vacation day rather than a religious holiday and they are permitted their golf, swimming, autos and boats; most of the population are in shops and factories engaged in a five day week so that two Sabbaths are free; more of the laws follow the Ohio pattern of alternative choices; fewer people are religiously orthodox. I would therefore favor a liberalized rule—perhaps even the abolition of *Sunday* laws—but I would not view this as currently a key issue in religious liberty.

5. *Confessions to a Minister as Privileged Communications.*

The present law with regard to the priest (minister)-communicant privilege can be understood only through historical study. In early England it is reasonably clear that there was no privilege in the priest or minister to refuse to reveal what he had learned from a confessant. In 1606 Father Garnet was convicted for refusal to testify as to what he learned concerning the gunpowder plot and Guy Fawkes.⁹⁹ Blackstone recognized only the attorney-client privilege.¹⁰⁰ There is fairly consistent English dicta against any clergy-communicant privilege.¹⁰¹ The common law of England continues to grant no such privilege.¹⁰² Within the past 75 years English priests have been convicted for refusing to reveal confessional information.¹⁰³

⁹⁹ *Rex v. Father Garnet*, 2 How.St.Tr. 218 (1606); Pollen, *Garnet*, 6 CATH. ENCYCL. 386 (1913).

¹⁰⁰ 3 BLACKSTONE, COMMENTARIES 370.

¹⁰¹ *Wilson v. Rastall*, 4 T.R. 753, 100 Eng. Rep. 1283 (K.B. 1792); *DuBarre v. Livette*, Peake 108, 170 Eng. Rep. 96 (N.P. 1791).

¹⁰² *Sacerdotal Privilege in English Law*, 221 L.T. 268 (1956); 8 WIGMORE, EVIDENCE §§ 2394-96 (3rd Ed. 1940). Cf., *Cook v. Carroll*, (1945) Ir.R. 515.

¹⁰³ *Wheeler v. LeMarchant*, 17 Ch.D. 675 (1881); *Regina v. Hay*, 2 F. & F. 4, 175 Eng. Rep. 933 (N.P. 1860).

In the United States, though the earliest cases recognized the common law to be the same as England, two-thirds of the states have statutes which prevent a minister or priest from testifying or revealing communications without the consent of the communicant.¹⁰⁴ These statutes protect only the confessional communication—the matters necessary to the pastor-communicant relationship in the discipline of the church. Therefore, similar to the case of the attorney, other matters (not necessary to the privileged relationship) are not privileged, *e.g.*, the emotional appearance of the person.¹⁰⁵ And a third person overhearing the privileged communication has been allowed to testify.¹⁰⁶

It would seem that for most Protestants the statutory provisions, where they exist, are adequate. The laws have tried generally to protect the essential privilege without adopting any one religious view. As in the case of the New York statute it is usually provided that the minister has a *duty* as well as a privilege not to testify.¹⁰⁷ The Catholic, however, argues that the privilege does not protect the priest from the communicant's revealing what the priest said in the interview or confessional, so that the penitent can testify that the Priest libelled another person. The Catholic insists that in Catholic discipline, the priest as well as the penitent must be protected.¹⁰⁸ Although I tend to favor the law recognizing religious practice as broadly as necessary to protect every claim of each church, I doubt whether the priest should be given the desired protection. To do so would be to go beyond the whole concept of privilege which was first developed only for lawyers. A client may report anything a lawyer said—the privilege does not protect the lawyer. The only effect of the client's testimony is to remove the seal from the lawyer's lips. The lawyer may then protect himself by a full revelation of the interview.¹⁰⁹

Many new disciplines are pressing for the privilege—psycholo-

¹⁰⁴ On the common law, see *Bahrey v. Poniatishin*, 95 N.J.L. 128, 112 Atl. 481 (1921); Hogan, *Privilege of the Confessional*, 6 LOYOLA L. REV. 1 (1951). Statutes and case law under them are reviewed in 8 WIGMORE, EVIDENCE § 2394 (3rd ed. 1940). See also *Privileged Communications to Clergymen*, 1 CATH. LAW. 199 (1955).

¹⁰⁵ *Estate of Toomes*, 54 Cal. 509 (1880); *Colbert v. State*, 12 Wis. 423, 104 N.W. 61 (1905). *Christensen v. Pestorius*, 189 Minn. 548, 250 N.W. 363 (1933) (minister hearing words in other capacity). See Louisell and Crippin, *Evidentiary Privileges*, 40 MINN. L. REV. 413 (1956). It is a true privilege; refusal to testify cannot be considered adversely. *Martin v. Bowden*, 158 Mo. 379, 59 S.W. 227 (1900).

¹⁰⁶ *State v. Brown*, 95 Iowa 381, 64 N.W. 277 (1895). See Hogan, *Privilege of the Confessional*, *supra* note 104.

¹⁰⁷ N.Y. CIV. PRAC. ACT § 351.

¹⁰⁸ Hogan, note 104 *supra*.

¹⁰⁹ AMERICAN BAR ASSOCIATION, *Canons of Ethics*, 37.

gists, social workers, marriage counsellors.¹¹⁰ Certainly all states should now provide the necessary privilege to make religious counselling effective. But they should not make the tent so broad as to house the charlatan or the irresponsible libeler or gossip.

CONCLUSION

The degree to which a society is able to grant religious freedom in the individual's relation to the state is the very touchstone of liberal democracy. For a nation which has only faced this problem realistically in the past twenty years the wall of protection is quite impressive. But the gaps in the ramparts are obvious. There is much important law to be developed in this field.

¹¹⁰ See Louisell, *Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731 (1957).